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IN THE

Supreme Court of the United States

October Term, 1957.

No. 296.

RAYMOND N. HEISELMOYER,
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

H. Francis DeLong,
Raymond W. Midgett, Jr.,
Barnes, Dechert, Price, Myers & Rhoads,
Attorneys for Respondent.

1600 Three Penn Center Plaza,
Philadelphia 2, Pa.

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QUESTIONS PRESENTED FOR REVIEW.

I. Where, beginning at the pre-trial conference and continuing until the evidence was closed, petitioner's claim was limited to a contention under the Boiler Inspection Act that in removing the backrest of an engineman's seat he suffered injuries because the backrest could not be removed easily and because, in one position, it might contact the independent brake valve handle, was it error for the trial court to charge the jury in terms responsive to petitioner's contention about the backrest rather than in terms of a theory advanced after the trial that the possible contact between the backrest and brake handle violated the Safety Appliance Act pertaining to train brakes, 27 Stat. 531 (1893), 45 U. S. C. § 1?

II. In a case arising under the Boiler Inspection Act, was it error for the charge of the trial court to define respondent's duty in the language of the statute, which employs words of everyday usage and common understanding?

STATEMENT OF THE CASE.

The petitioner, an employee of respondent railroad company, brought two separate actions in the district court. The first was an action under the Boiler Inspection Act to recover for personal injuries allegedly sustained on September 19, 1952. The second action, under the Federal Employers' Liability Act, was brought to recover for personal injuries allegedly sustained on July 9, 1954. Upon the petitioner's motion, the cases were consolidated and tried together. There were jury verdicts for the respondent in both actions. The court of appeals affirmed. The petitioner does not challenge the judgment of the court of appeals in the second action. (Petition, p. 5).

Petitioner's "Statement of the Case" ignores the many conflicts in the evidence and the jury's resolution of those conflicts. With respect to the first action, the petitioner offered testimony to show, as the respondent agreed, that the engineman's seat on the locomotive to which he was assigned could be rotated or swivelled to a position where, with the controls of the engine immediately behind the engineman's back, the backrest would contact the independent brake valve handle if the latter was in the fully applied (brake on) position. (Defendant's Exhibit 6, 50b, 478a; Plaintiff's Exhibit 3, 620a, 477a; 90a) The petitioner, who was at that time an engineman, testified that, because of this condition, he attempted to remove the backrest.[1] He claimed that the backrest came out about a quarter of the way and "just jammed"; that he jerked it three or four times; that it came out suddenly; and that his back

1. At least some enginemen did not think it was necessary to remove the backrest. R. P. Whalen, one of petitioner's witnesses, testified that he liked to operate the engine with the backrest on, and, in fact, he frequently pulled it part way out from the fully inserted position. (229a-230a)

struck the rear of the cab. (95a, 96a, 142a, 149a-150a)[2] He testified that when he examined the backrest afterwards it appeared to him that the tubular prongs of the backrest were not parallel but sprung outward. (98a-99a) The petitioner's testimony that the backrest was hard to pull out was corroborated by one of his witnesses. (225a)

The respondent's testimony was that the backrest would sometimes bind if an attempt was made to remove it improperly by pulling it unevenly—with more force on one side than on the other. (428a, 451a) There were inspections of the locomotive immediately before the alleged accident occurred, and after the alleged accident was reported. On the morning of the alleged accident the backrest had been put on the seat without difficulty, as on prior occasions. (426a) During the inspection made after the alleged accident was reported, the backrest was twice inserted and removed without any trouble whatsoever: "It worked very good, very freely". (450a)

The petitioner called no eyewitness to either accident, other than himself, and the employee alleged to have caused the second accident vigorously denied it. (402, 408a) Petitioner's testimony that he promptly reported both accidents (105a-106a, 176a; 168a-169a, 190a) was contradicted with respect to the first accident by the petitioner's own pre-trial deposition (177a-178a) and a contemporaneous locomotive inspection report filed by petitioner (Defendant's Exhibit 5, 183a-184a, 478a),[3] and with respect to the second accident

2. The petitioner's contention that he sustained "a terrific blow" (Petition, p. 4; 96a) was contradicted by the physical arrangement of the seat within the cab and the petitioner's position as he described it. Petitioner's stooping or crouching body (148a-149a) must have almost completely occupied the narrow 24-inch space between the backrest and the rear wall of the cab (351a; Plaintiff's Exhibit 3, 620a, 477a; Defendant's Exhibit 6, 50b, 478a) so that, if in fact there was an accident, the lower portion of petitioner's back could have travelled only a very short distance before striking the channel and not 24 inches as petitioner claimed (149a-150a).

3. The person to whom the petitioner claimed to have reported the first accident was dead at the time of trial. (175a-176a)

by both persons alleged to have received the reports. (378a-379a; 389a-390a)

The petitioner's assertion at the trial (173a), which he had made before (26b-27b, 47b-48b), that he had never had any trouble with his back prior to the first accident, was contradicted by petitioner's own family physician who, when subpoenaed as a witness by the respondent, testified to his treatment of the petitioner 18 months prior to the alleged first accident for symptoms similar to those that petitioner claimed originated following the first accident (36b-38b; compare 16b with 37b-38b).

It was for the jury to resolve these and other conflicts and to determine whether either accident ever happened. It found in favor of the respondent.

ARGUMENT.

This case does not meet the requirements that this Court has laid down for granting a writ of certiorari. *Supreme Court Rule* 19(b). The court of appeals has not decided an important question of federal law and its decision is not in conflict with any decision of this Court, other courts of appeals or state courts. There was a full and impartial trial, the issues tried by the parties were properly submitted to the jury, and the jury found for the respondent. The court of appeals correctly held that the jury's verdicts should not be overturned.

I. The Decision Below Presents No New Question of Interpretation of the Safety Appliance Acts and Does Not Conflict With Any Decision of This Court, Courts of Appeals, or State Courts.

Petitioner's contentions (Petition, pp. 6-7) that the decision of the court of appeals in this case has raised a question of interpretation of the Safety Appliance Act and that the decision below is in conflict with the decisions of this Court, other courts of appeals, and state courts are refuted by the opinion of the court of appeals (Opinion, Petition, pp. 24-25). It is apparent from that opinion that the court of appeals did not decide whether the independent brake was or was not a safety appliance within the meaning of 45 U. S. C. § 1. (Opinion, Petition, pp. 24-25) The court of appeals affirmed the verdict and judgment for the respondent because the district court had properly submitted to the jury the case the parties had tried. That case was based solely upon the petitioner's theory that the engineman's seat was a defective appurtenance under the Boiler Inspection Act [36 Stat. 913 (1911), as amended, 45 U. S. C. § 23] and that such a defect was a proximate cause of his injury. The court of appeals held that the petitioner's claims that the jury should have passed upon an

alleged violation of the Safety Appliance Act concerning train brakes, 45 U. S. C. § 1, and that the jury should have been specifically instructed that the independent brake was an appurtenance of the locomotive under the Boiler Inspection Act were not timely asserted.

The record overwhelmingly supports the opinion of the court of appeals. Tracing the litigation from complaint to charge shows that petitioner's theory of liability was that the respondent violated the Boiler Inspection Act by using a locomotive with an engineman's seat that was defective for two reasons: (1) the backrest did not come out as smoothly as it should have; and (2) the backrest would not rotate a full 360° without striking the independent valve handle at one point in that rotation if the handle was in the applied position.

Typewritten paragraphs 12 and 13[4] of the petitioner's complaint state unequivocally that the accident "was caused by reason of the defendant's violation of the Boiler Inspection Act" (5a), and that the petitioner suffered his injuries "by reason of a defect in the improperly constructed seat and seating arrangement on the locomotive of the defendant" (6a).[5] The complaint contains no reference to a defective independent brake.

At the pre-trial conference held less than two weeks before the beginning of the trial, petitioner's attorney did not even once refer to a defective independent brake. He did several times claim that there was a defective seat:

4. The first eleven paragraphs of the complaint as filed are printed forms.

5. Printed paragraph 1, designed as it was to broadly encompass every case, states that the action arises "under the Safety Appliance Acts, Title 45, U. S. C. A., Sec. 1-23 inclusive". (4a) In addition to §§ 1 and 23 upon which the petitioner relies, this comprehensive citation in the complaint includes such other obviously irrelevant sections as those relating to automatic couplers (§ 2), grab irons (§ 4), drawbars (§§ 5, 12), hand brakes for cars (§ 11), and locomotive ash pans (§ 17). Note that the same statutory citation appears in the complaint in the second action (37a) although that one is admittedly limited to a claim under the Federal Employers' Liability Act.

"In our case we are concerned with the seat in one of these locomotives. My man was an engineer . . . [who] in attempting to take his seat, either take it out or put it in, it was defective, . . . and as a result of it he fell back . . . and struck his back. . . ." (5b-6b) He then undertook to prove that the seat "was bound, it could not be removed, . . . that this was a bad seat" (8b). He made no objection when the trial judge stated: "In other words, the first case is a case involving an alleged defective or faulty seat. . . ." (8b) And at the conclusion of the discussion on the liability phase of the first accident the parties agreed to the trial judge's statement ". . . that on the first case the plaintiff's case will be based entirely upon the violation of the Boiler Inspection Act and the seat being defective . . .", the petitioner's attorney putting it in his own words: "Let me put it this way, that the seat was in a dangerous condition so that it created an unreasonable risk of harm to life or limb, so that I am speaking in the language of the statute itself." (11b) [6]

Thereafter, petitioner's attorney submitted "Plaintiff's Trial Memorandum" the pertinent part of which was devoted solely to a discussion of the Boiler Inspection Act. It twice refers to the case to be tried: first, that a seat is an "appurtenance" under that statute (12b); and, second, that a seat that cannot revolve 360° without interfering with the various brake handles is a defect and that a seat that is difficult to remove "renders the locomotive perilous to life and limb" (13b-14b).

And that was the theory of liability spelled out in the petitioner's opening speech (72a-73a):

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6. The relevant portions of the transcript of the pre-trial conference are in Appellee's Appendix in the court of appeals at pages 4b to 11b. Throughout, the phrase "Safety Appliance Acts" was used as a synonym for "Boiler Inspection Act" after petitioner's attorney told the trial judge that the Boiler Inspection Act "is frequently referred to, along with several other statutes, as one of the safety appliance laws". (5b)

> "We are going to ask you to find that these injuries were occasioned in the first instance by the failure of the railroad company to maintain this [seat] in a proper condition, in the first place, in installing it as it was so that the men had to take the seat back off; that is the backrest.
>
> "In the second place, in that they permitted the prongs to get into a binding condition so that they could not be used smoothly and easily. . . ."[7]

There was not even a hint that petitioner intended to rely upon any of the Safety Appliance Acts relating to brakes until the end of the fourth day of the trial when the petitioner had closed his case and the respondent had presented his motion under Federal Rule of Civil Procedure 50. Then the petitioner's attorney told the trial court that ". . . in so far as the brakes are concerned, safety appliances, those are covered by Section 11, 35 U. S. C. A." (341a) Both the title and section of the citation were irrelevant.[8] Even that hint was eliminated on the following day, the fifth day of the trial, when petitioner's attorney, in explaining the cross-examination of a witness as tending to show a defect in the backrest, confirmed the trial court's understanding of the pre-trial conference that "the first action was to be limited to the violation of the Boiler Inspection Act". (446a)

Petitioner's closing address again expressed the same theory: ". . . the sole issue was whether or not Mr.

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7. That the petitioner's objective was a jury finding that the seat, rather than the independent brake, was defective is further emphasized by the reference in petitioner's opening statement to "this seat [as] one of the so-called appurtenances of a locomotive within the language of the Boiler Inspection Act". (65a-67a) There is no reference to the independent brake as such an appurtenance. There is no reference to any of the Safety Appliance Acts.

8. Title 35 is "Patents". If Section 11 of 45 U. S. C. A. was intended, that, too, was irrelevant since it requires *cars* to be equipped "with secure sill steps and efficient *hand* brakes."

Heiselmoyer had trouble with the seat and whether, when he tried to release it, it wouldn't come out, and while tugging and yanking at it he fell backward and was hurt.". (486a) Merely "corollary thereto" was the question whether petitioner tried to remove the backrest because it sometimes came in contact with the independent brake valve handle. (487a)

This was the case the petitioner had tried and this was the case the judge submitted to the jury. He did it just the way the petitioner, his attorney, and his witnesses, had described it to him on several occasions before and during the trial:

> "The plaintiff further contends the seat was not in proper condition because it could not be completely turned; that is, did not make a complete circle of 360°. He further contends that when the seat was partially turned it struck the emergency brake handle and interfered with the plaintiff's access to the emergency brake handle and could cause him to pinch his hand between the seat and the handle of the emergency brake." (532a)
>
> * * *
>
> "The plaintiff claims that the defendant railroad violated its duty by not maintaining in good condition the engineer's seat in locomotive No. 5598 on September 19, 1952. He says the seat would not turn 360°; that is, turn completely around, that when it was turned it hit the brake valve lever and hit the armrest on the window of the locomotive. . . ." (534a)
>
> * * *
>
> "Now, it is your duty to determine from the testimony on this phase of the matter whether or not the seat was defective or not in good condition. If you decide that the preponderance of the evidence warrants no such finding, then your verdict on the first cause of action, or the September 19, 1952, incident, should

be for the defendant and you will not consider the plaintiff's first case any further.

"On the other hand, if you find by the preponderance of the evidence that the seat was defective or in bad condition, then you must next consider whether the defective seat was a contributing cause of the plaintiff's injury.

"If, in your considered judgment, and yours alone, based upon your understanding of the evidence, the seat was defective and the defective seat was a contributing cause of the plaintiff's injury, your verdict should be for the plaintiff." (535a)

In his points for charge and exceptions to the charge the petitioner for the first time asserted that there was an issue for the jury with respect to a violation of the "Safety Appliance Act as far as the brakes are concerned, . . . that they may not be either defective or inefficient". (551a-552a) But, of course, this was too late to affect the course of the trial as a practical matter for the evidence was all in. The charge requested was entirely out of line with the representations about his case that the petitioner had made in his complaint, at the pre-trial conference, in his trial memorandum, and at the trial. Both the respondent in trying its case, and the trial judge in framing for the jury the issues the parties had tried, were entitled to rely upon those representations. If the trial court had injected issues in its charge that the parties had not tried, it would have been prejudicial error. In affirming the judgment of the district court, the decision of the court of appeals thus followed, rather than conflicted with, the decisions of other courts. *Gallick v. New York Central Railroad Company*, 243 F. 2d 524 (2d Cir. 1957); *Clark v. United States*, 13 F.R.D. 342, 345 (D. Ore. 1952); *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F. Supp. 520, 524 (D. Ore. 1954); *Hartley v. Atlantic Coast Line Railroad Company*, 224 F.

2d 929, 930-932 (5th Cir. 1955). See also *Barry v. Reading Co.*, 3 F. R. D. 305 (D. N. J. 1943), *aff'd*, 147 F. 2d 129 (3rd Cir. 1944), *cert. denied*, 324 U. S. 867 (1945).

In any event, the decision of the court of appeals was correct because it made no difference whether the jury was instructed concerning a violation of the Safety Appliance Acts pertaining to train brakes or concerning a violation of the Boiler Inspection Act, or whether the ultimate question was couched in terms of a defect in the seat or a defect in the independent brake. The obligations of the respondent and the rights of the petitioner are the same under both statutes and with respect to both parts of the locomotive. The factual issue created by the contact between the backrest and the independent brake valve handle was submitted to the jury. If the brake were defective because, in the applied position, it would touch the backrest when the latter was revolved to a position where the controls of the engine were directly behind the engineman, then, by the same token, the backrest would be defective because, in such position, it would touch the brake handle. Stated either way, the ultimate factual issue under both statutes—whether the engine was defective or unsafe to operate—was submitted to the jury. The judge was not required to present to the jury the same factual issue on several legal grounds. In fact, the jury had no choice under the court's charge. If the jury believed that the contact between backrest and brake handle rendered the brake operation unsafe, the seat was defective; if the seat was defective and that defect was a cause of the petitioner's injury, he was entitled to a verdict. The charge requested by the petitioner relating to efficient brakes would do no more than the charge under the Boiler Inspection Act already had done: allow the jury to find for the petitioner if the jury believed that his injury was proximately caused by the possibility of contact between the backrest on the engineman's seat and the independent brake valve handle and believed that the possibility of such contact rendered the locomotive unsafe. As the court of appeals

put it, the trial judge "had given the jury a practical formula for its guidance on this branch of the problem . . . [which] could not be misunderstood." (Opinion, Petition, p. 25.) The petitioner was entitled to no more.[9]

After the charge and an adverse verdict, petitioner's motion for a new trial gave as a reason the district court's failure "to charge that the jury could find that there was a violation of the Safety Appliance Laws pertaining to brakes". (585a) The petitioner did not specify 45 U. S. C. § 1 as the statutory provision upon which he relied until after the argument on his motion for new trial,[10] when the trial court required him to file a brief on the narrow question of whether the independent brake was a safety appliance within the meaning of the Safety Appliance Acts pertaining to brakes. In that brief, recognizing the weakness of his position under § 1, the petitioner shifted his theory again. He then argued for the first time a reason not advanced before or at the trial or in his motions for new trial: that the independent brake was an appurtenance of the locomotive and, because of the possibility

9. The petitioner has suggested that the trial judge should have ruled as a matter of law that the respondent was guilty of a violation of the Boiler Inspection Act insofar as the brakes were concerned. (Petition, pp. 21, 16) This suggestion is based upon petitioner's assertion that respondent has conceded that "the independent brake was not functioning efficiently and properly". (Petition, pp. 15, 4) That assertion is without foundation in the record. The respondent has never conceded the inefficiency or impropriety of the independent brake. It has done no more than agree that the engineman's seat could be rotated or swiveled to a position where, with the controls of the engine immediately behind the engineman's back, the backrest would contact the independent brake valve handle if the latter were in the fully applied (brake on) position. (519a) Whether this situation constitutes a violation of the Boiler Inspection Act was for a jury, not the court, to determine after weighing the facts and circumstances. *Givens v. Missouri-Kansas-Texas R. Co.*, 195 F. 2d 225, 229 (5th Cir. 1952). The jury has considered the factual situation complained of by the petitioner in the trial court and decided in favor of the respondent.

10. Where petitioner had referred only in general terms to "the Brake Law". (Argument on Plaintiff's Motion for New Trial, pp. 26-32)

of contact between the brake valve handle and the backrest, the independent brake was defective in violation of the Boiler Inspection Act (45 U. S. C. § 23).

The petitioner's argument on these points illustrates the difficulties that result from his attempts to raise, after the trial, issues that were not in the case as it was tried. To intelligently determine whether an obviously technical and complicated device such as the independent brake was defective in violation of 45 U. S. C. § 1 or § 23 there should be evidence about what the independent brake is, when and under what circumstances it is used, how it operates, its relationship, if any, to the automatic brake, and the rules of the Interstate Commerce Commission. There was no evidence on these matters except the half-dozen sentences from the petitioner: that the independent brake applies the brakes on the engine alone; that the automatic brake applies the brakes on the entire train including the locomotive; that both the independent and automatic brakes are air brakes; and that there is a hand brake that is applied when the locomotive is out of service. (77a-79a.) As a result petitioner has gone outside the trial record in this Court, as he did in the courts below, to bring in a page or two from each of two texts he has selected. (Appendices A to F referred to at page 13 of the Petition.) None of this material was admitted or even offered in evidence at the trial. It has not been tested by cross-examination and its accuracy and its relevance to the locomotive involved in this accident may be questioned. If the issues urged upon this Court had been issues at the trial, petitioner's experienced attorney would certainly have had testimony on the subject. And the respondent, too, would have had its day in court on these issues.

The petitioner agrees that the court of appeals affirmed the verdict and judgment for defendant on the ground that petitioner's claim was an afterthought. (Petition, pp. 9-10.) But then in his effort to create "new questions of importance turning on federal statutory interpreta-

tions" (Petition, p. 6) and to find a conflict with decisions of this Court where none in fact exists, the petitioner has ignored the court of appeals' opinion as a whole and seized upon two sentences in that opinion that merely reported what had occurred in the district court (Opinion, Petition, pp. 24-25):

> "In the course of plaintiff's motion for a new trial there was a closely argued question of whether the independent brake was a Safety Appliance under the Safety Appliance Acts covering brakes, 45 U. S. C. Section 1. It appeared highly questionable that the auxiliary independent brake, which was not known when this particular part of the law was adopted, was a safety appliance within the section." (Footnote omitted.)

We agree with the plaintiff that the question was "closely argued". (Petition, p. 10) We agree with the court of appeals that "it appeared highly questionable" that the independent brake was a safety appliance within 45 U. S. C. § 1.[11] The district court found that it was not such an

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11. An examination of 45 U. S. C. § 1 shows that the automatic brake which operates the power driving-wheel brake and the appliance for operating the train brake system is the brake contemplated and required by that section and that the independent brake which applies brakes only to the locomotive has nothing to do with that section. The legislative history shows that the first Safety Appliance Act, 27 Stat. 531 (1893), 45 U. S. C. §§ 1-7, was concerned with having the speed of the train controlled by a method other than by the necessity for brakemen to operate hand brakes while standing on the tops of freight cars. See dissenting opinion of Mr. Justice Burton, *Baltimore & Ohio Rwy. Co. v. Jackson*, 353 U. S. 325, 338 (1957). In *United States v. Erie R. R.*, 237 U. S. 402 (1915), this Court construed § 1 to require a power-brake system for a train consisting of an engine and cars coupled together for a run or trip along the road, saying (237 U. S. at 407-408):

> "It will be perceived that the air-brake provision [45 U. S. C. § 1] deals with running a train, while the other requirements [of the Safety Appliance Acts] relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run,

appliance. (610a-611a) The court of appeals has not decided the issue. And it has not decided that issue in this case because it found that the issue had not been properly raised at the trial. A fair appraisal of the opinion of the court of appeals can lead only to the conclusion that the "important question of federal statutory interpretation" referred to by the petitioner is not in the case before this Court and that there is no conflict with *Baltimore and Ohio Railway Company v. Jackson*, 353 U. S. 325 (1957), *Shields v. Atlantic Coast Line Railroad Company*, 350 U. S. 318 (1956), or any other decision of this Court.

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or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. . . ."

And the Court of Appeals for the District of Columbia [*Richmond, F. & P. R. Co. v. Brooks*, 197 F. 2d 404, 407 (1952) *cert. denied*, 344 U. S. 828] has recently concluded that "the Act [45 U. S. C. § 1] contemplates a system of power control emanating from the engine" so that the engineer can "regulate the speed of the train and obviate the danger and uncertainty of control by hand brakes."

The statute, by its terms, deals with *train brake systems* in connection with *trains* and *train movements*. Both clauses of the statute contemplate train operation. The first clause requiring locomotives to be equipped "with a power driving-wheel brake and appliances for operating the train-brake system" is limited in its application only to a train movement by the words ". . . to use on its line any locomotive engine in moving interstate traffic". The second clause refers only to the running of ". . . any train in such [interstate] traffic that has not a sufficient number of cars in it so equipped with power or train brakes . . .".

Thus, it is the automatic brake, which operates the train brake system that is contemplated by 45 U. S. C. § 1, not the independent brake which operates only the locomotive brakes.

In *United States v. Erie R. R.*, above, this Court held that § 1 does not apply to switching movements but only to over-the-road train movements. There is no evidence that such an over-the-road train movement was involved or even contemplated in this case. The only evidence is the petitioner's own testimony that shows plainly that he was assigned to a very limited switching operation—"an industrial shifter", "just shift[ing] into E. L. Lavino's", "just handl[ing] their one yard". (75a) The limited nature of the testimony on this issue, which is so vital when a violation of 45 U. S. C. § 1 is charged, further illustrates that no violation of that section was tried in this case.

The trial court's charge fully and fairly submitted to the jury the questions of whether the Boiler Inspection Act was violated if the backrest could not be removed easily or because it could contact the independent brake handle. These were the issues which had been framed by the petitioner and accepted by the trial court and the respondent. These were the issues about which evidence had been offered by both parties. For the trial court to inject into its charge, issues not raised until after the evidence was closed, or until after the petitioner suffered an adverse verdict, would have been a serious error. Beyond that, the points belatedly raised would have given the petitioner nothing more than, in fact, he received—they would have done nothing but submit the same fact issues under a slightly different word formula. Jury verdicts may not be overturned for such unsubstantial reasons.

II. There Is No Conflict Between the Decision of the Court Below and the Decisions of This Court, Other Courts of Appeals, and State Courts With Respect to the Absolute Duty Imposed Under the Boiler Inspection Act.

The petitioner contends that there is a conflict between the decisions of this Court, other courts of appeals and the decision of the court below in this case because it affirmed the charge of the trial judge with respect to the petitioner's action under the Boiler Inspection Act which, according to the petitioner, was cast in terms of negligence law. (Petition, pp. 5, 17-20)

The short answer is that the trial judge's charge with respect to petitioner's action under the Boiler Inspection Act is not cast in terms of negligence. The trial judge never suggested that the petitioner's recovery depended upon the defendant's negligence, nor did he refer to the need for notice or the exercise of due care. In fact, the trial court made it plain with an express instruction that

the negligence of either petitioner or respondent had nothing to do with the railroad's responsibility for the alleged first accident (535a):

> ". . . . In other words, any negligence of either the plaintiff or defendant does not enter into the case at all, that is the first case, and is not to be considered by you."

The petitioner seeks to misrepresent and distort the trial judge's charge by the repeated use of a label—"'safe place to work' doctrine"—which played no part whatsoever in the charge. The design of this portion of the charge is obvious. The trial judge first read the pertinent part of the Boiler Inspection Act (533a):

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and *safe to operate* in the service to which the same are put, that the same may be employed in the active service of such carrier *without unnecessary peril* to life or limb . . . ." (Emphasis added.)

He then described the duty imposed upon the respondent in substantially the language of the statute. He told the jury that the respondent's duty was an "absolute and continuing" one. Thereafter, he briefly commented upon "safe" and "unnecessary peril" as those words are used in the statute. (533a-534a) [12] The language of the statute,

12. Subsequently, the court did charge that, under the Boiler Inspection Act, the respondent was responsible if any of its equipment was of such character "in its normal operation . . . that it renders the locomotive unsafe in that it subjects its employees to an unreasonable risk of harm to life or limb". (535a) The petitioner did not object to this statement and he could not. The words were his. See the transcript of the pretrial conference (11b), and Plaintiff's Points for Charge 1, 5, and 6 (562a-564a).

and the charge, was clear and unambiguous. Statutory construction will have gone too far when it denies the trial judge the power to describe a duty imposed by the statute in the statutory language, particularly when that language employs "words of everyday usage and common understanding" [*Banta v. Union Pacific R. Co.*, 362 Mo. 421, 430, 242 S. W. 2d 34, 40 (1951)]. If the petitioner thought that the trial court's references to "safe" and "safe place to work" were as erroneous and prejudicial as he now claims them to have been, he should have made a timely objection at the close of the charge so that the trial court would have had an opportunity to consider its charge and any need to modify it. The petitioner's failure to make a timely objection ended the matter. Federal Rule of Civil Procedure 51.[13]

The charge stated the contentions of the litigants, and then instructed the jury that it was its duty to determine whether or not the seat was defective or not in good condition. The final instruction on the subject of liability required the jury to find for the petitioner if the defective seat was a contributing cause of the petitioner's injury. (535a) The trial judge thus took from the jury the question of whether a defective seat constituted an unnecessary peril and necessarily as a matter of law determined that such a defective seat would constitute an unnecessary peril and thus be a violation of the Boiler Inspection Act.

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13. Federal Rule of Civil Procedure 51 provides in pertinent part:

> ". . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. . . ."

CONCLUSION.

Respondent respectfully submits that the petition for certiorari should be denied.

Respectfully submitted,

H. Francis DeLone,
Raymond W. Midgett, Jr.,
Barnes, Dechert, Price, Myers
& Rhoads,
Attorneys for Respondent.

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